IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1105

RAMSEY CLARK,

Appellant,

v.

J.S. KIMMITT, *et al.*,

Appellees.

APPELLANT'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES

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The Solicitor General, on behalf of the United States, has agreed with appellant that the underlying issue in this case is "significant" and "important," that "the legislative veto provision in the Federal Election Campaign Act is unconstitutional," that this case raises "a purely legal question," and that the one-house veto issue is ripe in the constitutional sense (U.S. Memo 11-15). However, the Solicitor, in a reversal of the position taken by the United States in the courts below, has stated that the case does not meet prudential tests of ripeness because no regulation of the reconstituted Commission has been vetoed (*id.*). Although

recognizing that this position is not free from doubt, he has nonetheless urged the Court not to accept this case because the issue is recurring and it ". . . is likely to reach this Court soon enough, in a case that does not present difficult threshold issues . . . ." (*id.* at 15). Because this unelaborated statement appears to be at the heart of the Solicitor's position, appellant submits this Supplemental Memorandum to demonstrate that the Solicitor's premise, and hence his conclusion, is not supportable.

In fact, this Court cannot reasonably be expected to have another opportunity such as this one to resolve this mushrooming conflict for another two to three years. To our knowledge, there are only four other pending cases which, even tangentially, involve one-house veto issues. Each of these cases has features which makes it an unlikely vehicle for prompt resolution of the issue. The most publicized of these cases is *Atkins v. United States*, Nos. 41-76 *et al.* (Ct. Cl., May 18, 1977). There the Court of Claims, by a four-to-three vote, upheld the particular one-house veto provision found in the Federal Salary Act of 1967, 2 U.S.C. § 359(1) (1970), and dismissed the suit brought by 140 federal judges. Since the United States prevailed in that case, it cannot bring the case to this Court, and even if the judges seek *certiorari* (there is no direct appeal), the *Atkins* case is an unlikely vehicle for authoritative resolution of the one-house veto issue.

On the one hand, the case is of doubtful certworthiness since the Salary Act has recently been amended to eliminate the legislative veto provision. Pub. L. No. 95-19, 95th Cong., 1st Sess. (Apr. 12, 1977). On the other hand, it is highly unlikely that this Court would have to reach the merits even if it accepted the case because, as the United States argued there, the pay increase provisons are probably not severable from the legislative veto provision. Thus,

even if the legislative veto is unconstitutional, plaintiffs are not entitled to the pay increase they seek. This is not to say that the *Atkins* case has no bearing on the need for review in this case, for the Court of Claims' ruling will surely give new impetus to the already vigorous proponents of one-house vetoes in their efforts to include them in pending and future legislation.

The other Pay Act case, *McCorkle v. United States*, No. 76-1479 (4th Cir.), which has not yet been decided, has the same deficiencies as the Judges case – the only difference is that the plaintiffs there are Executive, rather than Judicial, branch employees. The third pending case, *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, Civ. No. 75-483-P (S.D. Ala., Aug. 20, 1976), *appealed*, No. 76-3712 (5th Cir.), is even less likely to reach this Court. It is a private contract action in which the district court held that the plaintiff lacked standing to raise the tangential one-house veto issue. *Id.* slip op. at 17-18.

The final case is *Chadha v. Immigration and Naturalization Service*, No. 77-1702, in the Ninth Circuit. Mr. Chadha is a deportable alien who applied for and was granted a suspension of his deportation by the Attorney General on the ground of extraordinary hardship. 8 U.S.C. § 1254(c)(1). However, the deportation order was reinstated as a result of a one-house veto of the Attorney General's action. *Id.* at § 1254 (c)(2); H.R. Res. 926, 94th Cong., 1st Sess. (Dec. 12, 1975). Mr. Chadha has appealed directly to the Ninth Circuit, and his deportaton has been automatically stayed.

However, the first brief has not even been filed in that case, and with the significant backlog of cases in the Ninth Circuit, a decision cannot realistically be expected in that case for another year-and-a-half to two years.

Certainly, Mr. Chadha has no incentive to expedite the case, because his deportation will be postponed as long as the case is delayed. Moreover, the Justice Department can be expected to agree that the statute is unconstitutional, so that the Court will probably delay a decision even longer than usual in order to request the views of the House of Representatives and the Senate, as was done in both of the Pay Act cases. If there is a petition to this Court at all, the briefing and argument may add another year before the one-house veto issue will be resolved.

Therefore, the present case presents the only likely vehicle for Supreme Court review of the one-house veto issue in the foreseeable future. This is a powerful reason for taking this case, which the Solicitor admits meets the Article III ripeness test, because a prompt resolution of this issue is vital. Numerous statutes already contain these provisions which allow one House of Congress to dictate Executive actions. Moreover, Congress is threatening to include such provisions in many other important pieces of legislation. For example, the Senate recently defeated a major effort to subject to a one-house veto all of the rules and regulations of the about-to-be-created Department of Energy (123 Cong. Rec. S. 7943-45 (daily ed. May 18, 1977)), and a similar attempt is almost certain to be made in the House which has been the stronger advocate of one-house vetoes. In addition, there is substantial Congressional support for pending proposals to make all rules of all agencies subject to a one-house veto (H.R. 116).

The problem will not vanish. As Congress wisely recognized in providing for expeditious treatment of constitutional challenges to the election laws which are before this Court, it is far better to face the matter now, rather than in a crisis situation at some later date (perhaps under an

energy bill involving billions of dollars), where the consequences may be far more grave and the issues far more difficult. In short, the Congress, the Executive, and, indeed, the Country will benefit from a prompt resolution of the one-house veto issue, and this is the only likely case in which such a resolution can take place.

Respectfully submitted,

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